In all the circumstances, after having given anxious consideration to the age, character, antecedents and family background of the respondent and the circumstances of the case as a whole, in respect of the first charge, I substitute a sentence of 18 months' imprisonment with effect from today and impose the mandatory order of whipping with six strokes. In respect of the second charge, I substitute a sentence of 18 months' imprisonment. The sentences to run concurrently as the offences were, in my view, committed in the course of a single transaction.

Finally, having regard to my aforementioned observations I direct that a copy of this judgment and copies of Dr Verghese's reports as well as other reports he may wish to tender, be transmitted to the relevant prison authorities.

Appeal allowed.

Solicitors: *Prabha Xavier & Associates.*

Reported by *Ng Sheau Jiuan*

Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO C1-31-260-86
GUNN CHIT TUAN J
24 FEBRUARY 1989

Contract – Forfeitable deposit – Failure of plaintiffs to pay balance of purchase price under sale and purchase agreements – Whether earlier deposits paid by plaintiffs constituted earnest deposits and were thus forfeitable – Words of the agreements and the entire circumstances of case to be looked at

Contract – Loss suffered by defendant upon breach of purchase contract by plaintiffs – Burden of proof cast upon defendant to show loss – Whether defendant had discharged burden and was entitled to compensation – Contracts Act 1950, s 75

Civil Procedure – Award of interest – Court's power to award interest from date prior to date of judgment under s 11 of Civil Law Act 1956 – Whether present case a fit and proper case for court to do so – Termination of contract by defendant upon plaintiffs' failure to pay balance of purchase price – Plaintiffs claim entitlement to deposits paid earlier and interest from date of contract termination to date of realization – Whether payment of interest was part of 'debt or damages' under s 11 of Civil Law Act 1956 – Civil Law Act 1956, s 11

Words and Phrases – 'Any debt or damages' – Civil Law Act 1956, s 11

By a written agreement of 31 March 1985, the first plaintiff agreed to purchase and the defendant agreed to sell 250,001 shares in a company for a sum of $700,000. By another written agreement of the same date, the second plaintiff also agreed to purchase and the defendant agreed to sell the balance of 250,001 shares in that company for a total price of $700,000. The sole asset of the company was a piece of land in the city of Kuala Lumpur. The plaintiffs paid a deposit of $20,000 as earnest money on 18 February 1985 and also made the following payments to the defendant as part payment of the balance of the purchase price under the agreements: a sum of $110,000 on 30 March 1985, a sum of $10,000 on 15 April 1985 and a sum of $280,000 on 8 August 1985. Subsequently, the plaintiffs failed to pay the balance of the purchase price totalling $980,000 ($490,000 under each of the agreements) and the defendant terminated both agreements and purported to forfeit the sum of $420,000, being $210,000 under each agreement. The plaintiffs applied by originating summons for declarations that they were entitled to recover from the defendant the sum of $400,000 ($200,000 each plaintiff) paid by the plaintiffs under the two agreements. On the issue of interest, the plaintiffs contended that they were entitled to have their money back immediately upon the defendant terminating the contracts and interest at the rate of 8% pa from that date of termination to the date of realization. They argued that the award of interest from a date prior to the date of judgment was governed by s 11 of the Civil Law Act 1956.

In their defence, the defendant contended that a total sum of $140,000 paid under both agreements was forfeitable deposit and that the balance of $280,000 is fair compensation for the loss suffered by the defendant in consequence of the plaintiffs' failure to complete. Furthermore, interest should only commence from the date of the court order and that s 11 had no application to the instant case because that section referred specifically to proceedings for the recovery of any debt or damages and this was not such. In reply, the plaintiffs argued that the sum of $120,000 under cl 2(i) of both agreements was not forfeitable deposit or earnest money and this was agreed to by counsel on both sides in the agreed statement of facts. As to the loss suffered, the plaintiffs submitted that the court had to consider whether the defendant had suffered a loss amounting to or in excess of the balance retained by it. Evidence of the value of the land was thus adduced by both parties before the court. The plaintiffs produced one valuation (through PW1) and the defendant two valuations (through DW1 and DW2).

Held, allowing the plaintiffs' application in part:

(1) The defendant should not be prejudiced just because of what was only an error on the part of its counsel in having orally consented to the agreed statement of facts which was filed by the plaintiffs' counsel but not signed by the defendant's counsel.

(2) The court should construe the agreements themselves and it was stated in cl 1 thereof that $10,000 was earnest deposit paid by each plaintiff. Clause 2(i) clearly stated that $60,000 was to be paid by each plaintiff 'as a deposit towards account of the purchase price'. Looking at the entire circumstances of this case, not only was the $20,000 paid on 18 February 1985 'earnest deposit' but also the $110,000 paid on 30 March 1985 and the $10,000 paid on 15 April 1985 were true deposits.

(3) Where money is deposited with either contracting party on the formation of a contract, prima facie it will be interpreted as a security for performance and hence be forfeited if the depositor, in breach of the contract, fails to perform his side of the bargain.

(4) The plaintiffs were thus each only entitled to recover the sum of $140,000 from the defendant and the defendant was ordered to return to the plaintiffs a sum of $280,000.

(5) The valuation of the land by both PW1 and DW1 was accepted and the valuation of DW2 was rejected. The defendant had failed to discharge the burden of proof cast upon it under s 75 of the Contracts Act 1950 to show that it had suffered a loss and was therefore entitled to compensation.

(6) The words 'any debt or damages' in s 11 of the Civil Law Act 1956 should be construed to cover any sum of money which is recoverable by one party from another. However, in the present case, the payment of interest was not within the contemplation of the parties as such payment of interest has not been provided for in the agreements to meet the situation created by the plaintiffs' breach of contract. Moreover, there was no evidence adduced that the plaintiffs had actually incurred charges in obtaining finance from another source to pay for the shares which they had contracted to purchase from the defendant. In all the circumstances, this was not a fit and proper case for the award of interest from 27 January 1986, ie the date when the plaintiffs themselves committed a breach of the agreements by failing to pay the balance of the purchase price to the defendant. Interest was, however, awarded at the rate of 8% pa to be paid from date of judgment to date of payment.

[*Editorial Note*: The plaintiffs have appealed to the Supreme Court vide Civil Appeal No 02-1 of 1989.]

Cases referred to

1 *Linggi Plantations Ltd* v *Jagatheesan* [1972] 1 MLJ 89 (folld)
2 *Fateh Chand* v *Balkishan Dass* AIR 1963 SC 1405 (refd)
3 *Shree Hanuman Cotton Mills* v *Tata Aircraft* AIR 1970 SC 1986 (refd)
4 *Sun Properties Sdn Bhd* v *Happy Shopping Plaza Sdn Bhd* [1987] 2 MLJ 711 (folld)
5 *Dies & Anor* v *British & International Mining & Finance Corpn* [1939] 1 KB 724 (refd)
6 *Amalgamated Property Co* v *Texas Bank* [1982] QB 84 (refd)
7 *Elson (Inspector of Taxes)* v *Prices Tailors Ltd* [1963] 1 All ER 231 (refd)
8 *Howe* v *Smith* (1884) 27 Ch D 89 (CA) (folld)
9 *Soper* v *Arnold* (1884) 14 AC 429 (HL) (folld)
10 *Bhai Panna Singh* v *Bhai Arjun Singh* AIR 1929 PC 179 (refd)
11 *London Chatham & Dover Railway Co* v *South Eastern Railway Co* [1893] AC 429 (refd)
12 *Wong Chong Chow* v *Pan Malaysian Cement Works Bhd* [1980] 2 MLJ 75 (refd)
13 *General Tire & Rubber Co* v *Firestone Tyre & Rubber Co Ltd* [1975] 2 All ER 173 (refd)
14 *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)* [1982] 2 WLR 253 (refd)

Legislation referred to

Civil Law Act 1956 s 11
Contracts Act 1950 s 75
Law Reform (Miscellaneous Provisions) Act 1934 [UK] s 3(1)

Sri Ram (*Joseph Yeo* with him) for the plaintiffs.
Raja Aziz Addruse (*P Royan* and *Wang Kuo Shing* with him) for the defendant.

Cur Adv Vult

Gunn Chit Tuan J: The plaintiffs applied by originating summons dated 16 September 1986, for the following reliefs against the defendant:

1 A declaration that upon a true construction of the written agreement dated 31 March 1985 ('the first agreement') and made between the first plaintiff and the defendant, the first plaintiff is entitled to recover from the defendant a sum of $200,000 paid by the first plaintiff to the defendant under the first agreement.

2 A declaration that upon a true construction of the written agreement dated 31 March 1985 ('the second agreement') and made between the second plaintiff and the defendant, the second plaintiff is entitled to recover from the defendant a sum of $200,000 paid by the second plaintiff to the defendant under the second agreement.

3 Alternatively, that this honourable court do declare the sums of money that the plaintiffs are respectively entitled to recover from the defendant under the terms of the first and second agreements.

4 Further or other consequential orders as may be necessary to give effect to the aforesaid declarations or any of them, including orders as to payment of moneys and interest thereon.

5 Costs of this action.

6 Such further or other relief as this honourable court deems just.

When counsel for the parties appeared before me in chambers on 28 January 1987, Mr Sri Ram for the plaintiffs stated that an affidavit in reply was only served on him the previous day and applied for an adjournment to file an affidavit in reply. He also applied for a hearing in open court. Raja Aziz, counsel for the defendant, had no objections to the applications, and I made an order that the defendant pay the plaintiffs' taxed costs of the adjournment thrown away. By consent I also directed under O 28 r 4 of the Rules of the High Court 1980, that the affidavits filed do stand as pleadings and that both sides be at liberty to lead evidence.

Hearing in open court began on 2 November 1987, and on that day Mr Sri Ram referred to a statement of agreed facts dated 27 October 1987, filed by M/s Sri Ram, Zulkifly & Kumar. In that statement it was stated that at all material times the defendant was the registered holder of 500,002 shares in a company called Dugaan Hati Sdn Bhd ('DHSB') being the whole of the issue and paid-up capital of the company. By an agreement in writing made on 31 March 1985 between the first plaintiff and the defendant, the first plaintiff agreed to purchase and the defendant agreed to sell 250,001 shares in DHSB for a sum of $700,000. By another agreement of the same date made between the second plaintiff and the defendant, the second plaintiff also agreed to purchase and the defendant agreed to sell the balance of 250,001 shares in DHSB for a total purchase price of $700,000. The plaintiffs paid a deposit of $20,000 as earnest money on 18 February and also made the following payments to the defendant as part payment of the balance of the purchase price under the said agreements:

(a) a sum of $110,000 on 30 March 1985;
(b) a sum of $10,000 on 15 April 1985;
(c) a sum of $280,000 on 8 August 1985.

The last date for the payment of the balance of the purchase price of $490,000 under each of the agreements (totalling $980,000) was 23 January 1986. The plaintiffs failed to pay the total sum of $980,000 on or before 23 January 1986. By letters dated 27 January 1986, the defendant by its solicitors terminated both agreements and purported to forfeit the sum of $420,000 being $210,000 under each agreement.

There was also a supplementary statement of agreed facts dated 5 December 1988 filed by M/s Wang Kuo Shing & Co, solicitors for the defendant, in which it was stated that the sole asset of DHSB is a piece of land in Jalan Ipoh held under lot 210 in s 48 in the city of Kuala Lumpur held under State Lease 1472. DHSB has no trading activity and the defendant is a wholly owned subsidiary of Aik Hua Holdings Bhd. The promoters of Aik Hua Holdings Bhd was the Selangor MCA and most of the shareholders are Selangor MCA members though there is no restriction against non-MCA members being shareholders in the company.

The defendant resisted the above-quoted originating summons on two grounds:

(a) that a total sum of $140,000 paid under both agreements is forfeitable deposit; and
(b) that the balance of $280,000 is fair compensation for the loss suffered by the defendant in consequence of the plaintiffs' failure to complete.

It was submitted by counsel for the plaintiffs that the central question for decision in this case was what is the sum which the defendant is entitled to keep in consequence of the plaintiffs' admitted breach of contract? According to counsel the following two subsidiary questions arose from the central question, namely:

(a) what is the deposit or earnest money which is forfeitable by the defendant automatically and without more by reason of the plaintiffs' breach of contract? and
(b) whether the defendant had suffered a loss amounting to or in excess of the balance retained by it. It is in relation to this second subsidiary question that evidence of the value of the said land was adduced by both parties before the court.

The first subsidiary question

The defendant's case was that a total sum of $70,000 under each agreement was forfeitable deposit. In support of that submission the defendant relied on several passages in *Linggi Plantations Ltd* v *Jagatheesan*;[1] *Fateh Chand* v *Balkishan Dass*;[2] *Shree Hanuman Cotton Mills* v *Tata Aircraft*[3] and *Sun Properties Sdn Bhd* v *Happy Shopping Plaza Sdn Bhd*.[4] Counsel for the plaintiffs stated that he accepted the propositions set out in those cases as being well established but contended that those principles do not assist the defendant in the present case. He submitted that the true deposit or earnest money which was forfeitable immediately upon breach of the agreement was $20,000. He then referred to the statement of agreed facts and contended that it concluded the point in the plaintiffs' favour because it was stated therein that the plaintiffs paid a deposit of $20,000 as earnest money on 18 February 1985 and made the following payments to the defendant as part payment of the balance of the purchase price under the agreements:

(a) a sum of $110,000 on 30 March 1985;
(b) a sum of $10,000 on 15 April 1985; and
(c) a sum of $280,000 on 8 August 1985.

However, after referring to *Dies & Anor* v *British & International Mining & Finance Corp*,[5] Mr Sri Ram also submitted that in each case it was a question of construction of the particular contract as to what sum the parties have prescribed as a forfeitable deposit. It was further submitted that merely because parties to the contract described a sum paid as a deposit does not without more make that sum forfeitable earnest money. For that submission counsel relied on the following passage of the Privy Council's judgment in *Linggi Plantations Ltd* v *Jagatheesan*:[1]

> It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment. This no doubt explains why in some cases the irrecoverable nature of a deposit is qualified by the insertion of the adjective 'reasonable' before the noun. But the truth is that a reasonable deposit has always been regarded as a guarantee of performance as well as a payment on account, and its forfeiture has never been regarded as a penalty in English law or common English usage.

It is now necessary to reproduce the relevant clauses of the said agreements which were prepared by M/s Sri Ram, Zulkifly & Kumar:

> 1 In consideration of the sum of Malaysian ringgit ten thousand ($10,000) only now or heretofore paid to the vendor by the purchaser as earnest deposit and towards account of the purchase price (the receipt whereof the vendor hereby expressly acknowledges) the vendor hereby sells and the purchaser hereby purchases 50% of the said shares free from encumbrances at the total purchase price of Malaysian ringgit seven hundred thousand ($700,000) only.
>
> 2 The balance of the purchase price of Malaysian ringgit six hundred and ninety thousand ($690,00) only shall be paid by the purchaser to M/s Wang Kuo Shing & Co (hereinafter called 'the vendor's solicitors') in the manner as follows:

(i) upon execution of this agreement, a further sum of Malaysian ringgit sixty thousand ($60,000) only as deposit towards account of the purchase price (the receipt whereof the vendor's solicitors hereby expressly acknowledge);

(ii) the balance of the purchase price shall be paid to the vendor's solicitors who shall hold the same as stakeholders within three months from the date of execution of this agreement provided always that the purchaser shall be entitled to an extension of a period not exceeding six months from the expiry of the aforesaid three-month period (hereinafter referred to as 'the extended period') to pay the balance of the purchase price upon a written request being made by the purchaser prior to the expiry of the aforesaid three-month period and provided further that the purchaser shall simultaneously with the making of the request for extension of time pay the vendor the sum of ringgit one hundred and forty thousand ($140,000) only being a further twenty per centum of the purchase price to the vendor's solicitors and provided further that the purchaser shall pay to the vendor interest on the final balance purchase price of ringgit four hundred and ninety thousand ($490,000) at the rate of fifteen per centum pa from the first day of the extended period until full payment thereof but in any event not later than the last day of the extended period, such interest to be paid simultaneously with the payment of the final balance of the purchase price.

5(b) In the event of the purchaser failing to pay the balance of the purchase price within the extended period as stipulated in cl 2(ii) above, the vendor shall be entitled to forfeit a sum of ringgit two hundred and ten thousand ($210,000) only being 30% of the purchase price and the vendor and/or its solicitors shall refund to the purchaser all other sums paid to the vendor under this agreement.

Counsel for the plaintiffs contended that the words in cl 2(i) of the agreements in this case, 'as deposit towards account of the purchase price', do not on a true construction of the agreements make the sum of $120,000 forfeitable deposit or earnest money. He pointed out that this has been accepted by the parties in the agreed statement of facts and the defendant could not now be heard to contend otherwise. He then referred to the following passage in the judgment of Lord Denning MR in *Amalgamated Property Co* v *Texas Bank*:[6]

> For many years I thought that when the meaning of a contract was uncertain you could look at the subsequent conduct of the parties so as to ascertain it. That seemed to me sensible enough. The parties themselves should know what they meant by their words better than anyone else. In this I was supported by a case of the Privy Council, *Watchman* v *Attorney-General of the East Africa Protectorate* [1919] AC 533. It was decided in 1919 and it was applied repeatedly in my early days in the courts of common law. But it was always repudiated by the more logical minds in Chancery. Eventually the logicians prevailed. In 1970 in *Whitworth Street Estates (Manchester) Ltd* v *James & Partners Ltd* [1970] AC 583 the House of Lords declared in Lord Reid's words, at p 603:
>
> '... it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.'
>
> I can understand the logic of it when the construction is clear: but not when it is unclear. Still, we must accept it. Nevertheless, a way of escape was left open by Viscount Dilhorne in that very case when he said, at p 611-E: '... subsequent conduct by one party may give rise to an estoppel'.
>
> So here we have available to us – in point of practice if not in law – evidence of subsequent conduct to come to our aid. It is available – not so as to construe the contract – but to see how they themselves acted on it. Under the guise of estoppel we can prevent either party from going back on the interpretation they themselves gave to it.

to support his submission that neither party should be allowed to go back on the interpretation they themselves gave to the contract. Counsel further stated that the agreed facts were settled by consent of counsel on both sides. Another submission of Mr Sri Ram was that the deposit in every case does not have to be ten per cent of the purchase price as the defendant seems to suggest. He pointed out that in *Fateh Chand* v *Balkishan Dass*[2] the earnest money was only Indian rupees (Rs) 1,000 whilst the total purchase price was Rs 112,500. Finally, as regards what amounts to earnest, Mr Sri Ram referred to the following passage of Vaidialingam J in *Shree Hanuman Cotton Mills & Anor* v *Tata Aircraft Ltd*:[3]

> From a review of the decisions cited above, the following principles emerged regarding 'earnest':
>
> (1) it must be given at the moment at which the contract is concluded;
> (2) it represents a guarantee that the contract will be fulfilled or, in other words, 'earnest' is given to bind the contract;
> (3) it is a part of the purchase price when the transaction is carried out;
> (4) it is forfeited when the transaction falls through by reason of the default or failure of the purchaser;
> (5) unless there is anything to the contrary in the terms of the contract, on default committed by the buyer, the seller is entitled to forfeit the earnest.

Counsel then pointed out that $10,000 was paid as earnest money in this case on 18 February 1985 and stated that earnest money must be paid on the date of the contract. Then after referring to *Sun Properties Sdn Bhd* v *Happy Shopping Plaza Sdn Bhd*[4] in which case it was held on appeal to our Supreme Court that on a proper reading of the sale agreement in that case the $1,000,000 forfeited was a true deposit and was lawfully and properly forfeited by the appellant, counsel pointed out that in this case the various sums referred to in the agreed statement of facts were paid after the date of execution of the contract. Therefore the submission of counsel for the plaintiffs was that the first subsidiary question should be

answered by holding that the only forfeitable earnest money is the sum of $20,000 and that the balance of $400,000 falls to be decided by reference to s 75 of the Contracts Act 1950.

On the other hand, it was the submission of counsel for the defendant that it was necessary to look at the relevant clauses in the said agreements pertaining to payments of the purchase price and forfeiture for breach of the agreements. He pointed out that by cl 1, on the date of execution of the agreement, $10,000 was already paid by each plaintiff to the defendant 'as earnest deposit and towards account of the purchase price'. By cl 2(i) upon execution of the agreements, a further sum of $60,000 was paid by each plaintiff 'as deposit towards account of the purchase price'. Clause 2(ii) is concerned with any request for extension of time for payment of the balance of the purchase price when a further sum of $140,000 (being the equivalent of 20 per cent of the purchase price) has to be paid. Clause 5(b) provides that in the event of failure by the plaintiffs to pay the balance of the purchase price within the extended period the defendant 'shall be entitled to forfeit a sum of $210,000 only being 30 per cent of the purchase price ...'. Counsel pointed out that the extended period referred to in cl 2(ii) of the agreements was varied. The first date of payment of the balance of purchase price upon extension of time was fixed at 23 January 1986. The plaintiffs extended the time of payment of the balance of purchase price and each paid a further sum of $140,000 in accordance with the provisions of cl 2(ii) of the agreements. Because the plaintiffs failed to pay the balance of the purchase price by the extended date the defendant terminated both agreements and forfeited the sum of $420,000, ie $210,000 under each agreement pursuant to cl 5(b) therein.

Counsel then stated that the courts have distinguished between 'true deposit' and 'part payment of purchase price' and referred to various passages in the judgment of the Privy Council in *Linggi Plantations Ltd* v *Jagatheesan*.[1] He then submitted that the court ought to find that the sum of $140,000 paid pursuant to the two agreements, being 10% of the total purchase price of $1.4m, was a true deposit and was therefore forfeitable forthwith upon breach by the plaintiffs of the agreements in failing to pay the balance of the purchase price on due date. Being a true deposit, the sum of $140,000 was not subject to the provisions of s 75 of the Contracts Act 1950, and the defendant would not have to prove damages in order to forfeit that sum. The reason, according to counsel, was because a true deposit, whether it is called earnest money or deposit, is a security or guarantee for the performance of the contract. Upon a breach or non-performance by one party to the contract, the victim of the breach is entitled forthwith to forfeit and retain the sum of money paid as such security or guarantee for performance. Counsel also contended that it was beyond doubt that the sum of $140,000 paid was intended to be a deposit by way of security or guarantee for the performance of the agreements and was a true deposit as evidenced firstly by cl 1 of the agreements which states that the sum of $10,000 was paid as 'earnest deposit and towards account of the purchase price'. Clause 2(i) also states that the sum of $60,000 was paid as 'deposit towards account of the purchase price'. Secondly, counsel pointed out that there was the following letter dated 30 March 1985, from the plaintiffs' solicitors M/s Sri Ram, Zulkifly & Kumar to the defendant's solicitors (exh D to encl 2):

CVK/j/5/768/85
CSL/1329/C/85/DHSB/KS
30th March 1985

M/s Wang Kuo Shing & Co, Advocates & Solicitors
2nd Floor, See Hoy Chan Properties Building
54 Jalan Rodger, Kuala Lumpur

Dear Sirs

Re: Sale and purchase of shares in Dugaan Hati Sdn Bhd.

We refer to the abovecaptioned matter.

We enclose herewith our clients' cheque no 039163 in the sum of $110,000 (one hundred and ten thousand only) being balance of 10% deposit.

Kindly let us have your clients receipt thereto.

Yours faithfully,
Sgd

followed by another letter dated 15 April 1985, from the plaintiffs' solicitors to the defendant's solicitors (exh E to encl 2):

Sri Ram, Zulkifly & Kumar
Advocates & Solicitors
Suit 2003 20th Floor
Wisma Hamzah Kwong Hing
No.1 Leboh Ampang
Kuala Lumpur
Tel 2254184

Bil Surat Kami JY/s1/5/768/85/G
Bil Surat Tuan CSL/1329/C/85/DHSB/KS
15 April 1985

M/s Wang Kuo Shing & Co.
Advocates & Solicitors
2nd Floor, See Hoy Chan Properties Building
54, Jalan Rodger
Kuala Lumpur

Dear Sirs,
Re: Sale and purchase agreement

We refer to our abovecaptioned matter.

Enclosed herewith please find eight (8) copies of the Sale & Purchase Agreement duly executed by our clients for your client's due execution.

We enclose herewith a cheque for the sum of $10,000 being the balance of the 10% deposit of $140,000.

Kindly acknowledge receipt and let us have the said Sale & Purchase Agreement duly executed for our further action.

Thanking you.

Yours faithfully,
Sgd
cc
client

It was contended that the clear references in the agreements and the letters of the plaintiffs' solicitors to the $140,000, which is 10% of the purchase price, as deposit, could lead to no other construction except that the intention of the parties was that the $140,000 was a deposit as security or guarantee for the performance of the contracts by the plaintiffs. This was reinforced by the conduct of the plaintiffs as purchasers when they only forwarded the agreements duly executed for the defendant's execution after the full amount of the $140,000, being 10% of the purchase price, was paid as deposit. The fact that the sum of $140,000 was also part payment of the purchase price did not make it any less a security or guarantee for performance and was a true deposit forfeitable upon breach. Counsel then referred to the following passage of Tan Sri Hashim Yeop A Sani SCJ (as he then was) in *Sun Properties Sdn Bhd & Ors* v *Happy Shopping Plaza Sdn Bhd*:[4]

> The expression 'as a deposit and part payment of the purchase money' always relates to the two alternatives that in the event of the purchaser making default the money is to be forfeited and that in the event of the purchase being completed the sum is to be taken as part payment. A deposit is not merely a part payment but is also an 'earnest' money to bind the bargain entered into and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract, see *Howe* v *Smith* (1884) 27 Ch D 89. The deposit therefore serves two purposes, that is, if the purchase is carried out it goes against the purchase money but the primary purpose for the deposit is to act as a guarantee that the purchaser means business, per Lord MacNaghten in *Soper* v *Arnold*.

Counsel pointed out that in the *Sun Properties* case[4] the Supreme Court had no difficulty in finding the sum of $1m described as deposit and towards account of the purchase price, which was the sum of $10m, was a true deposit and forfeitable when the purchaser breached the agreement by failing to pay the balance of the purchase price on due date. In this case, counsel pointed out that the agreements were both dated 31 March 1985, when they were entered into, by which time the total of $140,000, being 10% of the purchase price, had been paid and confirmed by the plaintiffs' solicitors in their above-quoted letters. Counsel for the defendant contended that the submission of counsel for the plaintiffs that the statement of agreed facts had concluded the matter was most misleading and a gross misrepresentation of the facts because it was contrary to the agreements and the plaintiffs' solicitors' own letters referred to above.

I considered that the defendant should not be prejudiced just because of what was only an error on the part of its counsel in having orally consented to the agreed statement of facts which was filed by plaintiffs' counsel but not signed by the defendant's counsel. In any case, the court should construe the agreement themselves and it is stated in cl 1 thereof that $10,000 was earnest deposit paid by each plaintiff. Clause 2(i) clearly states that $60,000 was to be paid by each plaintiff 'as a *deposit* towards account of the purchase price'. Looking at the entire circumstances of this case, it was my judgment that not only the $20,000 which was paid on 18 February 1985 as 'earnest deposit' but also the $110,000 paid on 30 March 1985 and the $10,000 paid on 15 April 1985 were true deposits: see *Elson (Inspector of Taxes)* v *Prices Tailors Ltd*.[7] Where money is deposited with either contracting party on the formation of a contract, prima facie it will be interpreted as a security for performance, and hence be forfeited if the depositor in breach of the contract fails to perform his side of the bargain: *Linggi Plantations Ltd* v *Jagatheesan*;[1] *Sun Properties Sdn Bhd* v *Happy Shopping Plaza Sdn Bhd*;[4] *Howe* v *Smith*[8]; *Soper* v *Arnold*.[9]

For the reasons above, I therefore declared that upon a true construction of the agreements dated 31 March 1985, the plaintiffs were each only entitled to recover the sum of $140,000 from the defendant and ordered that the defendant do return to the plaintiffs a sum of $280,000.

The second subsidiary question

As regards this question, counsel for the plaintiffs made the following submission:

(a) In order to take advantage of s 75 of the Contracts Act 1950, a vendor must prove that he has suffered damage and establish the quantum of that damage. Reference was made to the following passage in the judgment of the Privy Council in *Bhai Panna Singh* v *Bhai Arjun Singh*:[10]

> The effect of s 74 of the Contracts Act of 1872 is to disentitle the plaintiffs to recover simpliciter the sum of Rs 10,000 whether as penalty or liquidated damages. The plaintiffs must prove the damages they have suffered. The only evidence of loss is that of the loss on resale by Rs 1,000. There seems to be no ground for displacing the trial judge's finding that this was a genuine contract. The vendors remained in possession of the rents and profits of the property until resale, amounting, according to the evidence, Rs 450 to 500 per mensem. There is no ground for awarding them interest. On the other hand, they have received earnest money Rs 500 so that their actual damage is Rs 500.

(b) Decided cases seem to suggest that in order to retain the forfeited sum a defendant should counterclaim for compensation in a suit by the purchaser for recovery of the sum forfeited. But *Fateh Chand* v *Bal-*

kishan Dass[2] seems to suggest that there is no necessity for a counterclaim. Counsel pointed out that the defendant in this case has not pleaded a counterclaim and has merely stated in an affidavit that it is desirous of counterclaiming. This, he submitted, was insufficient and the defendant ought to have made a counterclaim either in the affidavit or by filing a formal counterclaim. But counsel added that on this issue of counterclaim he would leave the matter to the court.

(c) The point which required to be dealt with was whether the defendant has proved its loss and the extent of that loss. It was emphasized that the burden of proof was on the defendant so that if it leads conflicting evidence within its own case, the plaintiffs were entitled to invite the court to accept the evidence given by a witness for the defendant in the plaintiffs' favour and rule against the defendant on the basis of onus of proof. The evidence of loss was sought to be established by reference to the fall in the value of the land owned by the defendant between the date of the contract and the date of its breach. Three valuations were produced at the hearing, one by the plaintiffs and two by the defendant. The valuations were as follows:

Valuer	*Date*	*Open market value*
(a) Raja Selvam (PW1)	22 November 1985	$1,400,000
(b) Cheah Teow Keat (DW1)	17 January 1985	$1,196,000
(c) Edmund HC Ng (DW2)	11 November 1986	(i) $ 450,000 (as at 14 August 1985)
		(ii) $ 400,000 (as at 23 January 1986)

PW1, who is a chartered surveyor with a degree in estate management, University of London, and is a member of the Royal Institute of Chartered Surveyors and Institute of Surveyors, Malaysia stated in his evidence that he had taken all factors into consideration when he prepared his valuation report (exh I to encl 11). The factors which he took into consideration were, inter alia, its proximity to UMNO headquarters building, the Putra World Trading Centre, the Pan Pacific Hotel and the MIC headquarters. There was also approval for the development of a six and a half storey building on the land. PW1 also said that there was a gradual drop in property values between 1985 and 1986 and he was candid enough to state that the fall in the value of land in that area was about five to ten per cent. He also relied on an extract from the 1986 property report for the Jalan Ipoh area (exh P1) which stated that the prices for two-storey post-war shophouses in the Jalan Ipoh area were stable in 1985 and 1986.

DW1 is a surveyor with a diploma in valuation and has been in practice since 1979. He valued the said land at $1,196,000 in January 1985 and also stated that an approval for a six and a half storey building on the land would enhance the value of it because the permissible height in that area was only four and a half storeys. In answer to a question by the court, that witness stated that it was possible that prices of properties in the Jalan Ipoh area remained stable during the period in question and that fall in prices of land was more gradual unlike the fall in prices of stock and shares.

DW2 stated that he was a registered valuer with a Bachelor of Science degree and was a member of the Institute of Surveyors and of the Rating and Valuers Association of Great Britain. He produced a valuation report dated 11 November 1986 (exh D4) and valued the said land at $450,000 as at 14 August 1985. His valuation on the said land as at 23 January 1986 was $400,000, and he relied on two transactions in the vicinity of the said land, namely, the transaction involving the said land in 1984 and another transaction in May 1986 involving lot 198. DW2 adopted an average fall of 20 per cent and stated that between January 1986 to August 1986, the property would have fallen by 14 per cent in value.

It was the submission of counsel for the plaintiffs that the valuation of DW2 should be rejected. He pointed out that DW1 and DW2 could not both be correct. DW1 held an opinion that in January 1985, the land was worth $1.2m on that date. The evidence of DW1 was more in line with the evidence of PW1 and favoured the plaintiffs. Counsel further pointed out that there was a serious conflict of evidence within the defendant's case as to the value of the land as at the date of the breach, namely, 23 January 1986. He therefore submitted that the defendant had failed to discharge the burden of proof cast upon it by law both as to loss and its extent.

Counsel for the defendant on the other hand contended that the valuation of PW1 should not be accepted because he had come to his finding by comparing the value of a property not in the neighbourhood of Jalan Ipoh but in Jalan Tuanku Abdul Rahman. Counsel then ignored the evidence of his own witness, DW1, and stated that the valuation of DW2 had taken into account the value of a piece of land which is located next to the defendant's land. Based on the value of the neighbouring land, DW2 had assessed the value of the defendant's land at $400,000 in January 1986, ie the date of the breach. He contended that the defendant had therefore incurred a loss of $1,000,000.

Having heard all three valuers, I accepted the valuation of the said land by both PW1 and DW1 and rejected the valuation of DW2. Even if I had accepted the valuation of DW2, there was a conflict of evidence between DW1 and DW2 and I agreed with counsel for the plaintiffs that the defendant had therefore failed to discharge the burden of proof cast upon it under s 75 of the

Contracts Act to show that it had suffered a loss and was therefore entitled to compensation.

Interest

It was the contention of counsel for the plaintiffs that the awarding of interest from a date prior to the date of judgment is governed by s 11 of the Civil Law Act 1956 which is as follows:

> 11 In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:
>
> Provided that nothing in this section –
> (a) shall authorize the giving of interest upon interest;
> (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
> (c) shall affect the damages recoverable for the dishonour of a bill of exchange.

It was the submission of counsel that interest is payable to compensate a party who has been wrongfully kept out of his money for the period during which the deprivation took place, and interest should run from the date from which his right to have the money accrued. In support of that submission reliance was placed by him on the following passage in the speech of Lord Herschell in *London, Chatham & Dover Railway Co* v *South Eastern Railway Co*:[11]

> But, my Lords, the appellants contended that even though they might not under the terms of Lord Tenterden's Act be entitled to interest, yet interest might be given by way of damages in respect of the wrongful detention of their debt. I confess that I have considered this part of the case with every inclination to come to a conclusion in favour of the appellants, to the extent at all events, if it were possible, of giving them interest from the date of the action; and for this reason, that I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due, to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use. Therefore, if I could see my way to do so, I should certainly be disposed to give the appellants, or anybody in a similar position, interest upon the amount withheld from the time of action brought at all events. But I have come to the conclusion, upon a consideration of the authorities, agreeing with the court below, that it is not possible to do so, although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages.

Counsel pointed out that the Federal Court in *Wong Chong Chow* v *Pan Malaysian Cement Works Bhd*[12] had applied the above-quoted passage in Lord Herschell's speech and had awarded interest not from the date of judgment but from the date of completion of the contract in that case. He also referred to the following observation of Lord Salmon in *General Tire & Rubber Co* v *Firestone Tyre & Rubber Co Ltd*:[13]

> Interest is not awarded as punishment against a wrongdoer for withholding payments which he should have made. It is awarded because it is only just that the person who has been deprived of the use of the money due to him should be paid interest on that money for the period during which he was deprived of his enjoyment. No one suggests that the appellants acted dishonestly or unreasonably in withholding the money for five years; nor that they caused any of the delay in the granting of the patent. This, however, in my view, has little relevance. They enjoyed the use of the money during the whole of this time and in law it is deemed to have been due to them from the beginning of that period.

Counsel contended that the plaintiffs were entitled to have their money back immediately upon the defendant terminating the contracts on 27 January 1986, when the defendant by two letters of that date put an end to the contracts, and interest at the rate of 8% pa from 27 January 1986 to the date of realization should be awarded.

In reply, counsel for the defendant contended that interest should only commence from the date of the order of this court. He contended that s 11 has no application to the instant case because that section refers specifically to proceedings for the recovery of any debt or damages, and this was not such an action. He pointed out that the present case concerned proceedings for the recovery of a sum of money which was by agreement paid by the plaintiffs to the defendant and was neither a debt nor damages. The proceedings were for certain declaratory orders and not a claim for a debt or damages. Counsel also contended that in a case of proceedings for the recovery of a debt or damages it was envisaged that the claimant as the victim was making a claim against the wrongdoer. But in the present case it should be borne in mind that the defendant was the victim of the breach and the plaintiffs were the wrongdoers. The refund was necessitated by the plaintiffs' own breach. It followed that the defendant could not have been held to be withholding payment of any money wrongfully unless and until the court had made an order, and was therefore not liable to pay any interest for the period prior to the date of the order of the court. Counsel also pointed out that Lord Herschell in his above-quoted speech had concluded that after 'consideration of the authorities, agreeing with the court below, that it is not possible to do so (ie award interest as damages in respect of the wrongful detention of a debt), although no doubt in early times the view was expressed that interest might be given under such circumstances by way of damages'.

The House of Lords has held that the words 'any debt or damages' in s 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934 'are very wide, so that they cover any sum of money which is recoverable by one

party from another, either at common law or in equity or under a statute' (such as the UK Law Reform (Frustrated Contracts) Act 1943 in that case: see *BP Exploration Co (Libya) Ltd* v *Hunt (No 2)*[14]). As s 11 of our Civil Law Act 1956 is in pari materia with the said s 3(1) of the UK Law Reform (Miscellaneous Provisions) Act 1934, the words 'any debt or damages' in s 11 of our Civil Law Act 1956 should also be construed to cover any sum of money which is recoverable by one party from another.

But in the present case the payment of interest was not within the contemplation of the parties as such payment of interest has not been provided for in the agreements to meet the situation created by the plaintiffs' breach of contract. Moreover, there was no evidence adduced that the plaintiffs had actually incurred charges in obtaining finance from another source to pay for the shares which they had contracted to purchase from the defendant. Having considered the contention of both counsel, I decided in the exercise of the court's discretion under s 11 of the Civil Law Act 1956, that in all the circumstances this was not a fit and proper case for the award of interest from 27 January 1986, ie the date when the plaintiffs themselves committed a breach of the agreements by failing to pay the balance of the purchase price to the defendant. Interest was, however, awarded at the rate of 8% pa to be paid from the date of judgment, ie 23 December 1988, until the date of payment. As the plaintiffs were only successful in recovering about 70% of their claim, I therefore in the exercise of the court's discretion awarded them 70% of the taxed costs of the action.

Order accordingly.

Solicitors: *Sri Ram, Zulkifly & Kumar*; *Wang Kuo Shing & Co.*

Reported by *Ng Sheau Jiuan*

Mensa Mercantile (Far East) Pte Ltd v Eikobina (M) Sdn Bhd

HIGH COURT (KUALA LUMPUR) – SUIT NO D3-22-254-1987
SITI NORMA YAAKOB J
2 FEBRUARY 1989

Contract – Time for performance – No specific time mentioned – Whether time was of the essence of the contract – Whether reasonable time given for performance of obligation – Breach of contract – Remedy – Sale of goods – Whether specific performance the proper remedy – Whether damages an adequate remedy – Sale of Goods (Malay States) Ordinance 1957, s 58

Sale of goods – Breach of contract for sale of goods – Remedy – Whether specific performance the proper remedy – Whether damages an adequate remedy – Sale of Goods (Malay States) Ordinance 1957, s 58

Words and Phrases – 'As is where is'

By a memorandum dated 6 May 1987 executed by the parties to the suit, the defendant agreed to sell to the plaintiff certain used heavy construction machines for the sum of 92.5 million yen. It was also agreed that the defendant will accord the plaintiff the full exclusive right to act as the defendant's sales agent for the remaining machinery at the defendant's yard.

The memorandum was silent as to when the plaintiff was to make payment of the purchase price and as to when the defendant was to deliver the machines. However, the memorandum made reference to a formal sale and purchase agreement to be entered into with the mutual consent and understanding of both parties at the soonest possible time. No such agreement was executed between the parties and the plaintiff then filed the instant suit seeking, inter alia, an order for specific performance of the memorandum on the ground that the defendant had breached its obligations under the memorandum in failing to accept the purchase price when it was tendered.

In its defence, the defendant pleaded that it had made time the essence of the contract when it gave notice to the plaintiff that it was willing to accept payment and to deliver the machines to the plaintiff on or before 22 July 1987 and that when no such payment was made by that date the plaintiff was therefore in breach of the contract. The plaintiff denied that the date of completion was 22 July 1987 because as at that date both parties had yet to agree on specific issues in the agreement to be executed and that payment was only due five days later on 27 July 1987 but when tendered it was refused by the defendant in breach of its obligations under the memorandum.

The defendant had written a letter dated 7 July 1987 to the plaintiff fixing 22 July 1987 as the date of payment. It was contended for the defendant that by writing that letter the defendant had every intention to make time the essence of the contract as the plaintiff had been making unreasonable demands, thereby delaying the completion of the agreement. It was also submitted for the defendant that the 14-day period for payment stipulated in the letter was a reasonable period.

The plaintiff had written through its solicitors to the defendant on 18 July 1987 stating that it agreed to abide by the terms of the memorandum but since the date of payment, namely, 22 July 1987, set by the defendant had been given at too short notice, the plaintiff requested that it be given a week's notice to make payment and undertook to make payment by 27 July 1987. As this was a variation to the date fixed by the